

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Ex Parte Filings Addressing) File No.
Digital TV Allotments)
(MM Docket No. 87-268))

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF COMMUNITY TELEPLAY, INC.

Community Teleplay, Inc. ("CTI"), by its attorneys, hereby submits comments in response to the Federal Communications Commission's ("Commission") Public Notice inviting comment on the ex parte filings of Association for Maximum Service Television, Inc. ("MSTV") and the Association of Local Television Stations, Inc. ("ALTV"), which addressed the Digital TV ("DTV") Allotments set forth in the Sixth Report and Order.¹

I. INTRODUCTION

CTI is the licensee of a low power television ("LPTV") station presently broadcasting on UHF Channel 45 to viewers in the Norfolk-Virginia Beach area. CTI focuses its comments on MSTV's ex parte filing, because it presents the most troubling implications with respect to the Commission's rulemaking process. In particular, MSTV is attempting to circumvent the rules governing that process by untimely filing a pleading as a written ex parte presentation.

¹ In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, Sixth Report and Order, 9 Comm. Reg. (P & F) 994 (1997) [hereinafter Sixth Report and Order].

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II. BACKGROUND

The Commission released the Sixth Report and Order for MM Docket No. 87-268 on April 3, 1997.² The Commission has provided six separate opportunities for interested parties to respond to the Sixth Report and Order and petitions for reconsideration pertaining to that Order. The deadline for the last opportunity was October 8, 1997. MSTV participated in previous rounds of pleadings, including filing a petition for partial clarification and reconsideration ("Petition") of the Fifth and Sixth Reports and Orders on June 13, 1997, a reply to oppositions to the Petition on July 31, 1997, and a reply to supplemental oppositions on October 8, 1997.³

On November 20, 1997, MSTV filed a 270 page document with the Commission consisting of a new proposal for channel allotments and various technical reports under the title of "Ex Parte Submission."⁴ MSTV states that its belated filing is due to DTV interference characteristics discovered late in the summer of 1997 that required them to revise previous filings.⁵ Therefore, MSTV alleges that it was unable to timely incorporate the new channel allotment proposal in its response to issues addressing petitions for reconsideration by the October 8, 1997 deadline or separately request an extension of time to supplement its Petition or

² Id.

³ See MSTV Ex Parte Filing at 4 notes 5 & 6 (filed Nov. 20, 1997).

⁴ MSTV states that the 357 suggested changes to the Commission's table of allotments are improvements, but in effect it is a new proposal. MSTV Ex Parte Filing at 8-10.

⁵ Id. at 3. However, MSTV fails to show how these "late summer" discoveries justify generating an entirely new allotment table at this late date, nor why the alleged "problems" it identifies cannot be resolved on a case-by-case basis. Accepting MSTV's arguments (and the new allotment table that goes with them) puts the Commission in the untenable position of having to accept a new allotment table each time a party finds a "problem" with the previous one.

other previously filed pleadings.⁶ Instead, MSTV simply filed the new proposal as an ex parte presentation.

III. ARGUMENT

A. MSTV's Ex Parte Filing Is an Attempt To Circumvent The Commission's Rules Concerning Deadlines For Pleadings

The MSTV filing is an attempt to circumvent the Commission's filing deadline for a supplement to a petition for reconsideration. The Commission's rules state that:

[a] petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action No supplement to a petition for reconsideration filed after expiration of the 30 day period will be considered, except upon leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement.⁷

The Commission should treat MSTV's filing as any other untimely filed pleading -- without a separate pleading justifying an extension of time -- and dismiss it, because in substance, MSTV's filing is a supplement to its petition for reconsideration.

As the Commission is aware, filings are sometimes different in substance than the title of the filing dictates. Thus, the Commission properly treats filings according to their substance rather than their title to determine which procedural rules apply. For example, when comments filed in a proceeding requested that the Commission revisit an issue previously decided in another rule making, the Commission stated that the request in the comments was "in effect, an

⁶ Reply to Oppositions to Supplemental Engineering Information Filed in Support of Petitions for Reconsideration Submitted by the Association for Maximum Service Television, Inc., MM Docket No. 87-268 (filed Oct. 8, 1997); 47 C.F.R. § 1.429(d).

⁷ 47 C.F.R. § 1.429(d).

untimely request for reconsideration" and beyond the scope of the instant rule making.⁸ In another instance, a party titled a filing as a "Petition for Clarification," but the Commission determined that the filing was in fact an untimely filed petition for reconsideration and dismissed the petition.⁹ Further, the Commission found that a petition for declaratory ruling "was in substance [an untimely filed] petition for reconsideration" and dismissed it accordingly.¹⁰ Finally, the Commission has also treated an application for review as an untimely petition for reconsideration and dismissed the pleading.¹¹

The Commission has not yet taken the opportunity to define the line between an ex parte presentation and a pleading. But unless the Commission treats MSTV's filing as an untimely filed pleading, a loophole is created in the Commission's rules. When a party misses a filing deadline, the party will just change the title from comments or supplement to petition for reconsideration to "Ex Parte Submission." This tactic impedes the administrative efficiency of the Commission, because the pleading period never truly ends, which delays resolution of Commission proceedings.¹²

⁸ In the Matter of Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Eighth Report and Order, 11 FCC Rcd 1463, 1533 (1995).

⁹ Association of College and University Telecomms. Adm'r, 8 FCC Rcd 1781, 1782 (1993).

¹⁰ Federation of American Health Systems, 12 FCC Rcd 2668, 2669-70 (1997).

¹¹ AM Stereophonic Broadcasting, 84 FCC 2d 960, 967 (1981).

¹² For example, the Commission opened the record in the instant proceeding so that parties could comment on MSTV's filing, which further delayed resolution of this docket. In other proceedings, the Commission may not open the record, so parties will have to submit comments and oppositions -- titled as ex parte filings -- to rebut an implicit pleading, which will

The ex parte rules enhance "the ability of the public to communicate with the Commission in a manner that comports with fundamental fairness."¹³ However, the Commission should not allow parties to abuse the ex parte rules in order to make new proposals and substantively challenge Commission actions after the pleading deadlines have expired. The Commission's rules provide that a separate pleading to extend a filing deadline may be made, thus, affording parties an opportunity to inform the Commission about unexpected developments such as relevant technical discoveries that occur after agency action is taken.¹⁴ Further, in the instant docket, the Commission has extended the time for filing supplements to petitions for reconsideration and provided a total of six separate opportunities to comment on the Sixth Report and Order and pending petitions for reconsideration.¹⁵ MSTV failed to take advantage of the opportunities available under the Commission's rules to further extend the filing deadlines. Thus, MSTV should not be allowed to circumvent the Commission's rules by filing its pleading as an ex parte filing.

The MSTV filing does provide informative technical reports that by themselves would be a proper ex parte presentation, but the filing crosses the line from ex parte presentation to

take up more of the Commission's time. In the end, the public will suffer from the administrative inefficiency of the Commission's proceedings.

¹³ In the Matter of Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, Report and Order, 12 FCC Rcd 7348 at ¶ 4 (1997).

¹⁴ See 47 C.F.R. § 1.429(d).

¹⁵ The Commission extended the time for filing supplements to pending petitions for reconsideration to August 22, 1997. Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Order, FCC 97-1377 (released July 2, 1997).

pleading due to the fact that: (1) the last opportunity to file pleadings in this proceeding expired on October 8, 1997; (2) MSTV did not file a supplement to its Petition by August 22, 1997; (3) the length of MSTV's filing is 270 pages; (4) MSTV's filing indirectly suggests that the Commission put its filing out for public comment;¹⁶ and (5) the filing contains a new proposal for channel allotments.¹⁷

In complex proceedings in which many parties participate, such as MM Docket No. 87-268, the Commission must ensure that its pleading deadlines are adhered to in order to bring about a fair and swift resolution to the proceeding and DTV to the public. The Commission must carefully monitor parties who seek to circumvent deadlines via the ex parte rules. The deadline for filing supplements to petitions for reconsideration in the instant proceeding was August 22, 1997, and the last deadline for filing comments regarding the supplements was October 8, 1997. On November 20, 1997, MSTV filed a 270 page document containing a new proposal for the DTV Table of Allotments and technical reports under the title "Ex Parte Submission." The MSTV filing is in substance an untimely pleading without a separate pleading justifying extension of the deadlines as required by the Commission's rules and, therefore, must be dismissed.

¹⁶ See MSTV Ex Parte Filing at 1 n.2.

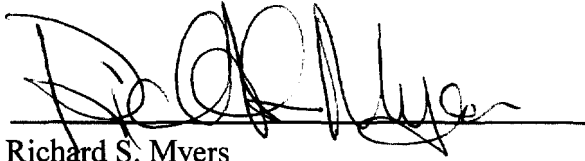
¹⁷ See supra note 4. ALTV's filing is a proper written ex parte presentation. It is six pages long and argues adoption of a proposal that was presented during the pleading period, and therefore, is not a new proposal. ALTV's Ex Parte Filing at 1 (filed Nov. 25, 1997).

IV. CONCLUSION

For the reasons stated above, the Commission must dismiss MSTV's "Ex Parte Submission" as an untimely filed pleading.

Respectfully submitted,

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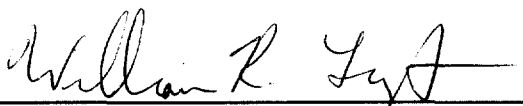
CERTIFICATE OF SERVICE

I, William R. Layton, an employee in the law firm of Myers Keller Communications Law Group, certify that, on this 17th day of December, 1997, a copy of the foregoing "Comments" was delivered by first class mail to:

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